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**IN THE
COURT OF APPEALS OF INDIANA**

DEREK E. REHWINKEL,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 79A04-0708-CR-480

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0610-FD-60

December 12, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Derek E. Rehwinkel appeals the trial court's imposition of a six-year executed sentence following his guilty plea to Cocaine Possession,¹ a Class D felony and to being a habitual substance offender.² We affirm.

FACTS AND PROCEDURAL HISTORY

On August 14, 2006, two witnesses notified Lafayette police that Rehwinkel had been driving a car despite his status as a habitual traffic violator. Police arrested Rehwinkel for driving a car while being a habitual traffic violator. Police took Rehwinkel into custody. While processing Rehwinkel, correction officers observed that he was chewing or swallowing something. The officers ordered him to spit out the object, but he refused to do so. Rehwinkel also refused to identify what was in his mouth. Because of his refusal to identify the substance he had just ingested, the officers transported Rehwinkel to the hospital emergency room.

Initially, Rehwinkel did not appear intoxicated, but he soon became disoriented. He began convulsing and called out for help. At some point, Rehwinkel said that he had swallowed ten grams of cocaine. Rehwinkel was admitted to the hospital for treatment. Lab reports indicated the presence of cocaine and amphetamine in his system.

On October 25, 2006, Rehwinkel was charged with cocaine possession, as a Class D felony, operating a vehicle while classified as a habitual traffic violator, as a Class D felony, and with being a habitual substance offender. On February 8, 2007, the parties

¹ Ind. Code § 35-48-4-6 (2006).

² Ind. Code § 35-50-2-10 (2006).

filed a written plea agreement with the trial court, in which Rehwinkel pled guilty to cocaine possession as a Class D felony and to the habitual substance offender charge. In return for Rehwinkel's guilty plea, the State dismissed the remaining charge as well as two unrelated petitions to revoke probation. The plea agreement further provided that the executed portion of Rehwinkel's sentence would be capped at six years. The trial court accepted the plea agreement and on March 21, 2007, sentenced Rehwinkel to three years on the Class D felony enhanced by five years for the habitual substance offender count, for a total of eight years with six years executed and two years suspended to supervised probation. This appeal follows.

DISCUSSION AND DECISION

On appeal, Rehwinkel challenges his sentence on two grounds. First, he contends that the trial court abused its discretion by failing to find his alleged mental illness to be a significant mitigating factor. *See Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007). Next, Rehwinkel contends that his sentence is inappropriate in light of the nature of his offense and his character. *See* Ind. Appellate Rule 7(B).

I. Abuse of Discretion

Generally, sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion so long as the sentence is within the statutory range. *Anglemeyer*, 868 N.E.2d at 490. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

There are numerous ways in which a trial court may abuse its discretion. One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits the reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court could have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91 (citations omitted). Unlike the pre-Blakely statutory regime, a trial court cannot now be said to have abused its discretion by failing to properly weigh aggravating and mitigating factors against each other when imposing a sentence because the trial court no longer has any obligation to do so. *Id.* at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is ... authorized by statute; and ... permissible under the Constitution of the State of Indiana.” *Id.* (quoting Ind. Code § 35-38-1-7.1(d) (2007)).

Rehwinkel argued at the March 21, 2007 sentencing hearing that his mental illness was a mitigating factor. In support, Rehwinkel claimed, in his Pre-Sentence Investigation Report, that he has previously been diagnosed with Attention Deficit Hyperactivity Disorder, Antisocial Personality Disorder, Schizoaffective Disorder and Conduct Disorder. Furthermore, Rehwinkel’s mother and brother testified about periods of mental instability dating back to his childhood. Aside from his and his family’s accounts of such mental illness, Rehwinkel did not introduce any documented medical evidence or expert

testimony supporting his claim of mental illness. Ultimately, the trial court specifically found there were no mitigating factors.

Generally, the trial court is in the best position to judge the credibility of the witnesses and to weigh the evidence, and we will not reweigh the evidence or judge the credibility of the witnesses on appeal. *See Lipscomb v. State*, 857 N.E.2d 424, 427 (Ind. Ct. App. 2006). The trial court is not obligated to find Rehwinkel's alleged mental illness to be a mitigating factor or to grant the significance of Rehwinkel's alleged mental illness the same mitigating weight that Rehwinkel himself would. *See Scott v. State*, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006), *trans. denied*. Furthermore, "[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993).

Here, as is stated above, the trial court expressly found that there were no mitigating factors. Although there was testimony concerning Rehwinkel's alleged mental illness, the trial court determined that it was inadequate to establish a mitigating factor. Given the mere lay testimony of Rehwinkel's mental illness and the evidence in the record suggesting that Rehwinkel's alleged mental illness causes him to violate the law only when he lives in Indiana, we are not convinced that the trial court abused its discretion in failing to find the evidence of mental illness to be a mitigating factor.

II. Inappropriateness

Rehwinkel further argues that we should exercise the authority granted to this court by Appellate Rule 7(B) and revise his six-year sentence, which he believes is

inappropriate in light of the nature of his offense and his character. This court has the constitutional authority to revise a sentence pursuant to Appellate Rule 7(B) if we find that it is inappropriate in light of the nature of the offense and the character of the offender; however, our review of any sentence is deferential to the trial court's decision. App. R. 7(B); *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). The burden lies with the defendant to persuade this court that his or her sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 494 (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Rehwinkel contends that the nature of his offenses, possession of cocaine and being a habitual substance offender, do not justify the imposition of the six-year sentence, which was the maximum allowed in his plea agreement. We disagree. Rehwinkel argues that the nature of his crime does not warrant the six-year sentence because his actions caused no harm to anyone but himself, his offense was not associated with an allegation of dealing, and his offense was not committed in the presence of children. We find this argument unpersuasive. The facts show that Rehwinkel has a substantial history of substance abuse, dating back to when he was a teenager. The facts further show that in the instant offense, Rehwinkel swallowed ten grams of cocaine while being processed by officers during another arrest and admitted that he was a habitual substance offender. His actions highlight the egregiousness of his offense and, as a result, we are unpersuaded that Rehwinkel's sentence is inappropriate in light of his offense.

Rehwinkel also argues that his sentence is inappropriate in light of his character. Rehwinkel claims that he is an addict, he did not intend to hurt anyone, and he suffers

from mental illness, not inferior character. His brother and mother testified that he is a good person who has simply made a number of bad choices. Again, we disagree.

The record shows that Rehwinkel has a substantial criminal history dating back to when he was a juvenile. His criminal history includes juvenile adjudications, including battery, theft, and being a runaway. His record also includes numerous convictions as an adult, including, but not limited to, public intoxication, minor consumption, criminal recklessness while armed with a deadly weapon, operating while intoxicated, public intoxication, theft, resisting law enforcement, battery, escape, and numerous convictions for possession of a controlled substance/marijuana. Rehwinkel has continually been in and out of prison and has been on probation for most of his adult life. Rehwinkel's history clearly suggests that he has had numerous opportunities to reform his behavior, but thus far has refused to do so. Rehwinkel has failed to persuade us that his sentence was inappropriate in light of his character. Having concluded that the six-year sentence was not inappropriate based on both the nature of the offense and the character of the offender, we now affirm the sentence imposed by the trial court.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.